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August 11, 1994

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AUG 11 1994

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

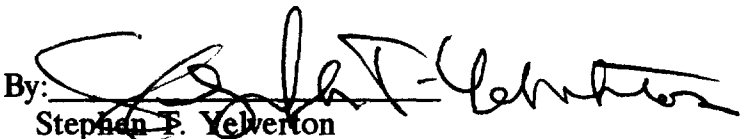
Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its opposition to a request for acceptance of response, filed by Wilburn Industries, Inc. on August 2, 1994.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By:   
Stephen F. Yelverton

Enclosure

B:CATON.150

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AUG 11 1994

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio

)  
)  
) MM Docket No. 93-107

)  
) File Nos. BPH-911230MA

)  
) through

)  
) BPH-911231MB  
)

To: The Review Board

OPPOSITION TO WII REQUEST  
FOR ACCEPTANCE

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: \_\_\_\_\_  
Stephen T. Yelverton  
Attorneys for Ohio Radio  
Associates, Inc.  
1155 15th Street, N.W.  
Suite 400  
Washington, D.C. 20005  
Telephone: (202) 659-3900

August 11, 1994

B:CATON.150

## OPPOSITION TO WII REQUEST FOR ACCEPTANCE

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this opposition to request for acceptance. On August 2, 1994, Wilburn Industries, Inc. ("WII") filed a "Request for Acceptance of Response." Therein, WII seeks leave to file a response to ORA's July 22, 1994, opposition to WII's July 14, 1994, tower site amendment. In support of its opposition to the request, ORA submits the following comments.

On July 14, 1994, WII filed an amendment to its pending application. On July 22, 1994, ORA timely filed an opposition thereto. Pursuant to Section 1.294 (b), WII is not allowed to reply to ORA's opposition. Accordingly, WII's response is barred by the rules and must therefore be rejected forthwith.

WII seeks leave to circumvent the proscription of Section 1.294 (b), by contending that ORA's opposition makes misleading allegations against it. In its request, at p. 4, and in its response, at pp. 9-10, WII contends that ORA incorrectly alleged that it never informed the Commission when it first learned that its tower site had been sold. According to WII, it was advised by a letter from the tower site owner, which was received on March 7, 1994, that its specified tower site had been sold.

However, WII mischaracterizes ORA's opposition. What ORA argued in its opposition, at p. 1, was that WII had never informed the Commission when it first became aware that its tower site had been sold. Although WII duly noted when it received the letter from the tower site owner, it cleverly never acknowledged when it first learned or became aware that the tower site had been sold.

There is a decisionally significant difference between learning of an event through verbal communication and then receiving written confirmation of that event. If WII was informed of the sale before receiving the letter on March 7, 1994, it has even less basis for claiming "due diligence" and "good cause" in amending. Moreover, its petition for leave to amend and amendment would be misleading in this respect.

WII has yet to inform the Commission when its tower site was sold and when it first became aware of that sale, either through verbal or written communications. Because WII has refused to provide the Commission with this critical information, ORA searched the local land records. Attached hereto is a deed for the tower site in question which was recorded on January 6, 1994. Accordingly, there is a period of two months in which WII has failed to make an acknowledgement as to whether it then became aware of the sale.

In its response, at p. 10 and n. 8, WII attempts to refute the legal arguments and Commission precedent cited in ORA's July 22, 1994, opposition. However, this is a blatant violation of Section 1.294 (b). Indeed, with respect to that portion of ORA's opposition, WII does not even make the pretense of claiming that ORA made some unfair or misleading allegations. WII merely launches into a point by point attempted refutation of the arguments made by ORA, as if it had an unqualified right to file a reply to ORA's opposition.

WII's attempted refutation is, in any event, unavailing. ORA cited, at p. 3 of its opposition, to Imagists, 8 FCC Rcd 2763, 2765, para. 14 (1993) and to Capitol City Broadcasting Co., 6 FCC Rcd 5525 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2629, para. 4, n. 2 (1992), only for the basic and fundamental proposition of law that an applicant must

document any claim of "good cause." This includes documenting its financial qualifications because of any increased costs resulting from the amendment. See, Pontchartrain Broadcasting Co., Inc. v. FCC, Case No. 93-1291, p. 5, decided Feb. 11, 1994.

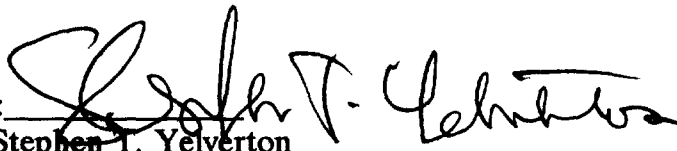
WII has utterly failed to document its claim of "good cause" and its claim to be financially qualified in view of substantially increased costs to implement the amended tower site proposal. It only relies upon generalized and conclusory statements. This is patently inadequate.

ORA did not cite to Imagists or Capitol City because of a close similarity of the facts to the specific circumstances of WII. Obviously, every case is different as to the facts and WII could easily write a treatise attempting to distinguish the facts of its case from any cited decision. However, these differences are without any decisional significance. Such "strawman" arguments as to some perceived differences in the facts are nothing more than a diversionary tactic employed by WII in the hope that the Board will not focus its attention on the fact that it has utterly failed to comply with the basic and fundamental proposition of law articulated in Imagists and Capitol City as to the documentation of "good cause" for amendments.

WHEREFORE, in view of the foregoing, ORA requests that the Review Board deny the request of WII for acceptance and to reject its response. WII's response is an unauthorized reply in violation of Section 1.294 (b). It has failed to demonstrate that waiver of that provision is justified.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

Stephen T. Yelverton

Attorneys for Ohio Radio  
Associates, Inc.

1155 15th St., N.W., Suite 400

Washington, D.C. 20005

Tel. 202-659-3900

August 11, 1994

020979.00001

ORA.811

Attachment 1

GENERAL WARRANTY DEED

QNP CORPORATION, aka QNP CORP., an Ohio corporation, for valuable consideration paid, grants with general warranty covenants to SPIRIT COMMUNICATIONS, INC., an Ohio corporation, whose tax mailing address is: 114 Dorchester Square, Westerville, Ohio 43081, the following real property situated in the County of Delaware, in the State of Ohio, and in the Township of Trenton, and bounded and described as follows:

SEE "EXHIBIT A" ATTACHED HERETO  
AND INCORPORATED HEREBIN.

Last Instrument Reference: Deed Book 449,  
page 793, Recorder's Office, Delaware  
County, Ohio.

Also known as: 12951 East State Route 37,  
Sunbury, Ohio

This conveyance is subject to all covenants, restrictions, easements, and taxes accrued through the date of closing, if any, of record. The grantors do further hereby remise, release and forever quit-claim to the said Spirit Communications, Inc., its successors and assigns forever, that certain\*

IN WITNESS WHEREOF, the Grantors have caused this Deed to be executed this 6th day of JANUARY, 1994.

Signed and Acknowledged  
in the Presence of:

QNP CORPORATION, aka QNP CORP.

By:

Carl C. Nourse, President

STATE OF OHIO,  
COUNTY OF FRANKLIN, SS:

BE IT REMEMBERED, that on this 6th day of January, 1994, before me the subscriber, a Notary Public in and for said county and state, personally appeared the above-named QNP CORPORATION, aka QNP CORP., through its President, Carl C. Nourse, who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed and the free act and deed of QNP CORPORATION.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, on the day and year aforesaid.

Provisions contained in any deed or other instrument for the conveyance of a dwelling which restrict the sale, rental or use of the property because of race or color are invalid under federal law and are unenforceable.

Notary Public

This Instrument Prepared By:

Carl B. Fry, Esq.  
FRY & WALLER CO., LPA  
35 East Livingston Avenue  
Columbus, Ohio 43215  
614 / 228-2300

\*radio transmission

DONALD L. SHAW  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES JUNE 25, 1995

213  
14  
14

\*radio transmission tower along with all attachments, guy wires, appurtenances, and other paraphernalia necessary for the operation thereof.

P. 2

714

Delaware County  
The Grantor has complied with  
Section 319.202 of the R.C. Code  
Date 1-10-94 Transfer Tax Paid 66.00  
TRANSFERRED OR TRANSFER NOT NECESSARY  
Jon M. Peterson, Auditor By CL. [Signature]

DELAWARE COUNTY, OHIO	
FILED FOR RECORD	JAN 10 1994
RECORDED	2:03 PM
VOL	567
Ray L. Corbin	
FEE \$	22.00
COUNTY RECORDER	

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43215  
1420  
State St  
name John  
MAU  
(2)



P. 3

16148751345

JAN 07 '94 09:59 BISCHOFF &amp; ASSOC

P. 2/3

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**BISCHOFF & ASSOCIATES, INC.**

Consulting Engineers

Principals

Edward A. Bischoff, P.E., P.S.  
 John R. Grosse, P.E.  
 Allen D. Robinson, P.E.

Associates

J. Scott Sands, P.E.  
 Mark E. Carnahan, P.S.  
 B. James Huth, P.S.

**EXHIBIT "A"**

Project No. 10300

January 3, 1994

**DESCRIPTION OF 3.000 ACRES  
 OF A RADIO TOWER SITE FOR  
 QNP CORPORATION**

Situated in the State of Ohio, County of Delaware, Township of Trenton, and being part of Lot Twenty-nine (29), Section Three (3), Township Four (4) North, Range Sixteen (16) West, United States Military Lands and being conveyed by deed to QNP Corporation as recorded in Deed Book 449, Page 773, Recorder's Office, Delaware County, Ohio and being more particularly described as follows:

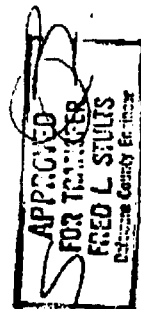
Beginning at a (found) 16 inch diameter stump with a P.K. Nail (set), at the northeast corner of the above described 3.000 acre tract, said stump and P.K. Nail being at the Southeast corner of a 16.21 acre tract owned by Thomas J. and Jane M. Hard (Deed Book 0520, Page 238) and also being in the west line of a 146.0 acre tract owned by Henry D. Wilson Jr., et al (Deed Book 413, Page 525) all being of the Recorder's Office, Delaware County, said (found) stump and P.K. Nail (set) being the **TRUE PLACE OF BEGINNING** of this description;

Thence South 00 Degrees, 00 Minutes, 00 Seconds West, along the west line of the 146.0 acre Wilson tract, a distance of 660.00 feet to a Railroad Spike (set) in the centerline of Old State Route 37 and passing a (found) 3/4 inch iron pin (1.68 feet west) at 4.11 feet and passing a (found) 3/4 inch iron pin (0.14 feet East) at 613.60 feet;

Thence North 90 Degrees, 00 Minutes, 00 Seconds West, along the centerline of Old State Route 37, a distance of 198.00 feet to a Railroad Spike (set) in said centerline;

Thence North 00 Degrees, 00 Minutes, 00 Seconds East, along the easterly line of a 7.25 acre tract owned by David B. & Curtis J. Cockrell (Deed Book 459, Page 223), a distance of 660.00 feet to a (found) 3/4 inch iron pin (up 0.3'), in the southerly line of the aforesaid 16.21 acre Hard tract, and passing a (found) 3/4 inch pin (flush) at 46.34 feet and passing a (found) 3/4 inch iron pin (up 0.3') at 656.18 feet;

Thence South 90 Degrees, 00 Minutes, 00 Seconds East, along the southerly line of the said 16.21 acre Hard tract, a distance of 198.00 feet returning to the **TRUE PLACE OF BEGINNING** and containing 3.000 acres more or less and being subject to all legal rights-of-way, easements and restrictions of record.



P-4

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JAN 07 '94 09:59 BISCHOFF &amp; ASSOC

P.3/3

Project No. 10300

January 3, 1994

Page Two (2)

**BASIS OF BEARINGS:**

Bearings were based on the previous deed for this tract and the east line as being South 00 Degrees, 00 Minutes, 00 Seconds West.

NOTE: As per the Previous Deed of Record (Deed Book 449, Page 773). The Grantors do further hereby remise, release and forever quit-claim to the said QNP Corporation, its successors and assigns forever, that certain radio transmission tower along with all attachments, guy wires, appurtenances, and other paraphernalia necessary for the operation thereof.

The above description was prepared based on an Actual Field Survey by Bischoff & Associates, Inc. on December 30, 1993 and January 3, 1994 and from Records on file at the Recorder's Office, Delaware County, Ohio.



B. James Forth  
Registered Surveyor No. S-7416

Date

04 Jan. 94

h:36293/ease/misc/QNP.des



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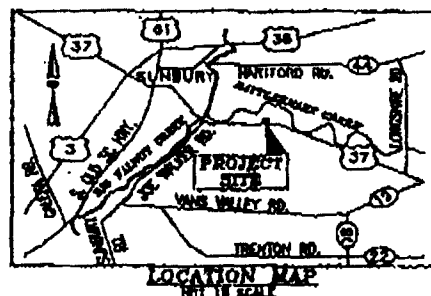
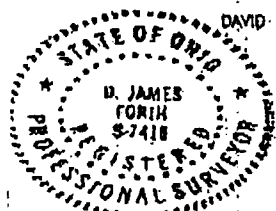
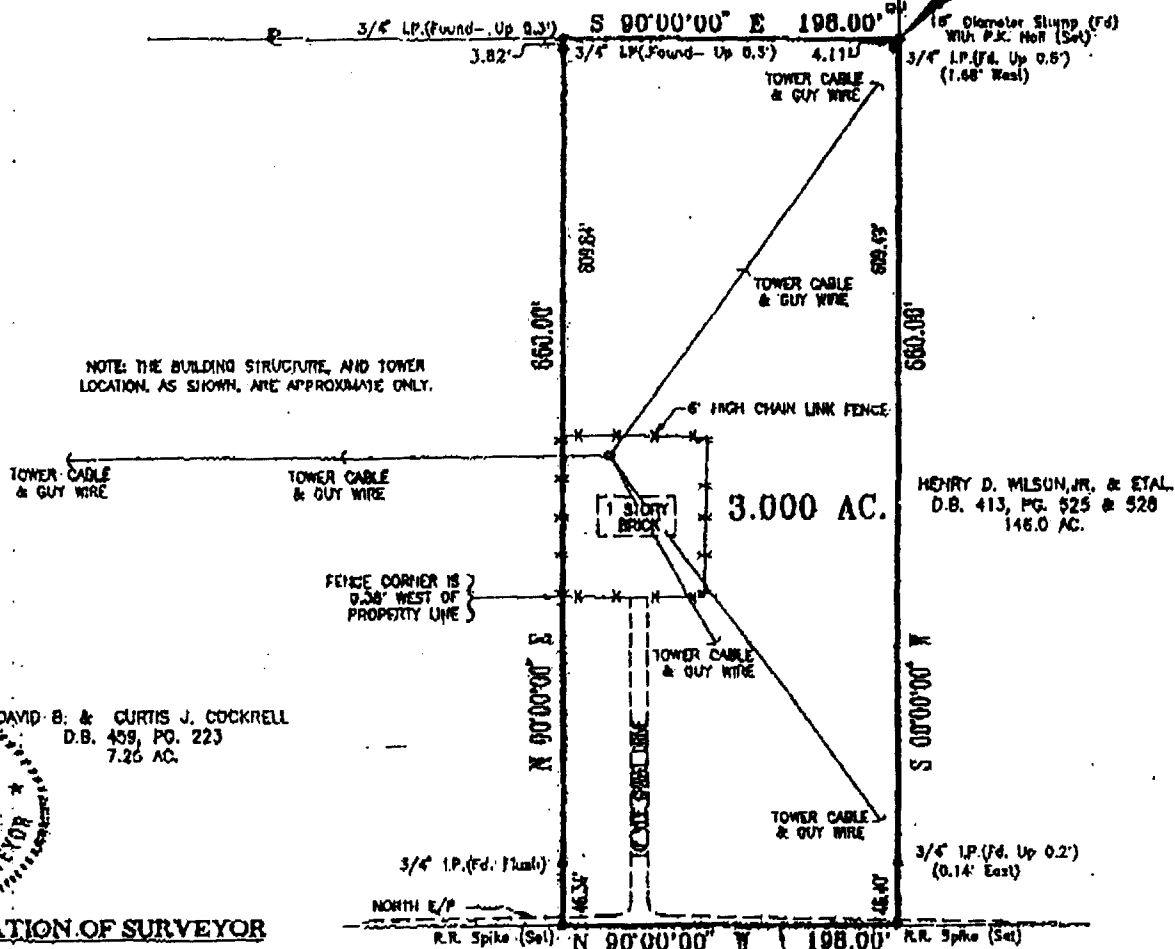
P. 5

16148751346  
JAN 07 '94 10:00 BISCHOFF & ASSOC

P.4/3

**SURVEY PLAT**  
OF  
**3.000 ACRES**

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SITUATED IN THE STATE OF OHIO, COUNTY OF DELAWARE, TOWNSHIP OF TRENTON,  
BEING PART OF LOT NO. 29, SECTION 3, TOWNSHIP 4 NORTH,  
RANGE 16 WEST, OF THE UNITED STATES MILITARY LANDS.**BASIS OF BEARINGS**BEARINGS WERE BASED ON THE PREVIOUS DEED FOR  
THIS TRACT, AND THE EAST LINE AS BEING S 00°00'00" W.THOMAS & JUNE HARD  
D.B. 520, PG. 238  
16.21 AC.**TRUE PLACE  
OF BEGINNING**DAVID B. & CURTIS J. COCKRELL  
D.B. 458, PG. 223  
7.26 AC.**CERTIFICATION OF SURVEYOR**I HEREBY CERTIFY TO STAR BANK AND TO HUMMEL TITLE  
AGENCY INC., THAT BISCHOFF AND ASSOCIATES, INC. MADE AN  
ACTUAL FIELD SURVEY OF THE PREMISES AS SHOWN ON DECEMBER  
30, 1993, & JANUARY 3, 1994 AND THAT SAID PLAT IS A CORRECT  
REPRESENTATION AS DETERMINED BY SAID SURVEY. ALL DIMENSIONS  
ARE IN FEET AND DECIMAL PARTS THEREOF. NOTE: ALL IRON  
PINS(SET) ARE 3/8\"/>

1120 Chambers Road

Columbus, Ohio 43212

### CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 11th day of August, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to WII Request for Acceptance" to the following:

Joseph A. Marino, Chairman\*  
Review Board  
Federal Communications Commission  
Room 211  
2000 L Street, N.W.  
Washington, D.C. 20554

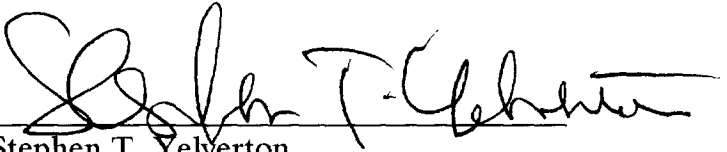
James Shook, Esquire  
Hearing Branch  
Federal Communications Commission  
Room 7212  
2025 M Street, N.W.  
Washington, D.C. 20554

Arthur V. Belenduik, Esquire  
Smithwick & Belenduik, P.C.  
1990 M Street, N.W.  
Suite 510  
Washington, D.C. 20036  
Counsel for David A. Ringer

James A. Koerner, Esquire  
Baraff, Koerner, Olender & Hochberg, P.C.  
5335 Wisconsin Avenue, N.W.  
Suite 300  
Washington, D.C. 20015-2003  
Counsel for ASF Broadcasting Corp.

Eric S. Kravetz, Esquire  
Brown, Finn & Nietert, Chartered  
1920 N Street, N.W.  
Suite 660  
Washington, D.C. 20036  
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire  
Law Office of Dan J. Alpert  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Counsel for Shellee F. Davis



Stephen T. Yelverton

\*Hand Delivery